No. 180.

Brief on Motion for Leave

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

Folios 6,990 to 2.

T. FINNEY, as Receiver, et al.,

Plaintiffs in Error,

vs.

MARY A. GUY, etc.,

Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

FRED. W. REED,
For Plaintiffs in Error.

(18,296)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1902.

No. 443.

A. C. FINNEY, as Receiver, et al.,

Plaintiffs in Error,

vs.

MARY A. GUY,

Defendant in Error.

On Writ of Error to the Supreme Court of the State of Wisconsin.

BRIEF OF PLAINTIFFS IN ERROR.

NOTE.—The figures in brackets refer to the indented numbers in the transcript; other references are specified.

STATEMENT OF THE CASE.

The Farmers and Merchants State Bank was a banking corporation organized under the Constitution and statutes of Minnesota on the 6th day of January, 1888, and carried on a general banking business at the city of Minneapolis, in that state, up to June 20th, 1893, on which day, being insolvent, it made an assignment in insolvency for the benefit of creditors under the state law. At that time the bank owed the plaintiffs in error (aside from A. C. Finney, who is joined here as receiver appointed as below mentioned) the sum of $91,255.84. The entire net proceeds of the estate of the bank were $12,539.95, and the state of Minnesota, whose claim was $28,219.98, being under the laws of Minnesota a preferred creditor, such entire proceeds were applied on its claim, leaving a large balance and the entire claims of all other creditors unpaid. The capital stock of the bank was $75,000.00, and under the laws of Minnesota each stockholder is liable to

the creditors of the bank to double the amount of his stock in addition to the subscription price of the same. An action was commenced in the district court of Hennepin county, Minnesota, in January, 1894, in behalf of all creditors of said bank who should come into such action and against all the stockholders, to enforce this liability. The bank and the assignee of the bank were also parties defendant. As provided by said laws, an order was made requiring all creditors of the bank to join in said action within six months, and excluding all others from any participation in the proceeds of such action. The plaintiffs in error (aside from Finney) all joined in said action and no others. Judgment was duly entered in said cause on April 28th, 1897, in favor of plaintiffs and against each stockholder personally brought into the action, for his maximum liability and against the bank for the aggregate sum of $106,471.71, and specifying the amount due each one of the plaintiffs separately. It was provided further in said judgment that Finney should, by a formal order thereafter to be entered, be appointed receiver (51) for the purpose of collecting and enforcing the respective liabilities of the stockholders, and be empowered to proceed against stockholders in other jurisdictions to enforce their liability. Such formal order was duly made. (Exhibit A, 54-58.) By this order said Finney was given full power and discretion to proceed against and enforce the liability of non-resident stockholders against whom no personal judgment could be obtained in Minnesota, as well as to collect said judgment already obtained and to distribute all proceeds so obtained among all the said creditors pro rata to their respective claims. The receiver qualified and proceeded to collect such judgment, but most of such judgments were wholly worthless, and the total amount he was able to collect from such judgments and from the non-resident stockholders, other than this defendant Guy, was less than $13,500.00. The total liability of all non-resident stockholders was $25,000.00, and of this amount $16,000.00 of such liability had been enforced or settled. At the time of the commencement of this action there was due plaintiffs more than $100,000.00 on said judgment against the bank on which nothing could ever be collected or realized, except such sum as could be obtained from the remaining $9,000.00 liability of non-resident stockholders, including that of defendant here, of which sum her liability is $3,800.00. At the time of the bank becoming insolvent defendant Mary A. Guy held 19 shares of stock. During all the times in question she was a resident of the state of Wisconsin.

In March, 1899, this action was commenced in the circuit court of Pierce county to enforce this liability. The receiver Finney joined with him, as parties plaintiff, all the creditors appearing in the Minnesota suit, and in the complaint all the foregoing facts were duly set out. (31-59.) Defendant demurred to this complaint (60) on the ground, among others, that it does not state facts sufficient to constitute a cause of action. The circuit court filed its order entered July 1st, 1899, overruling this demurrer (64); the defendant appealed to the supreme court (67). The Wisconsin supreme court, on March 20th, 1900, reversed the order on the ground (94) "that the complaint fails to state a cause of action that can be entertained by the courts of this state," and directed (94) that the same be remanded to the circuit

court, "for further proceedings according to law." Justice Dodge dissented. January 8th, 1901, said demurrer was again brought on for hearing in the circuit court, and the court entered its order sustaining the demurrer and dismissing the action (102), and on March 27th, 1901, judgment of dismissal was entered on said order (106). Plaintiffs appealed from such judgment (20), and on September 24th, 1901, judgment was entered in the supreme court of Wisconsin affirming the judgment of the circuit court (110). On September 28th a writ of error was allowed by the chief justice of said court (6) to said judgment, and the case brought here.

The clerk of the supreme court of Wisconsin transmitted here with his return a certified copy of the brief of plaintiffs in error on each of the appeals to that court, the first marked "*Respondents' Brief*" and the second "*Appellants' Brief*," also a certified copy of the rules of said court requiring such briefs to be filed and to state among other things "the several errors relied upon for reversal," and "the principles of law applicable to the case, and the authorities in support of the same;" also an affidavit of the attorney for plaintiffs in error and an affidavit of the circuit judge, but refused to make any of said papers a part of his return. On January 20th, 1902, plaintiffs in error submitted to this court in print a motion for certiorari to complete the record by having such papers made a part of same. On January 27th, the court announced that the consideration of such motion was postponed until the record was printed. The record was then printed, and on February 24th, 1902, said motion for certiorari was granted "without prejudice." The affidavits and rules referred to were printed in full on the motion for certiorari. After such motion was granted 12 additional copies of said "Respondents' Brief" and 11 copies of said "Appellants' Brief," with an affidavit of the attorney that said copies were all that could now be produced, were duly filed with the clerk of this court.

ASSIGNMENT OF ERRORS.

The plaintiffs in error respectfully submit that the supreme court of Wisconsin erred in the judgment rendered in this:

1. That is denies plaintiffs a right given by Sec. 1, Art. IV., of the Constitution of the United States, which reads:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

And the following statute passed in pursuance thereof, to-wit:

> Revised Statutes of the U. S., Sec. 905: "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed

thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

2. That its decision and judgment is contrary to Sec. 1, Art. IV., of the Constitution of the United States, and to Sec. 905 of the Revised Statutes of the United States, in that it does not give full faith and credit to the public acts, records and judicial proceedings of the state of Minnesota, and does not give to the public acts, records and judicial proceedings of the state of Minnesota such faith and credit as they have by law and usage in the courts of the state of Minnesota.

3. In holding and deciding that to refuse to enforce plaintiffs' right of action in the courts of Wisconsin, is not violative of Sec. 1, Art. IV., of the Constitution of the United States and Sec. 905 of the Revised Statutes of the United States, which provides that the public acts, records and judicial proceedings of every state shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they were taken.

General status of the law as to enforcing this liability against stockholders in foreign jurisdictions.

This question has been frequently before the courts of late years, and the general principles to govern in such cases established by many decisions. The leading cases and the main propositions here in point are these. Such provisions as those of the Minnesota Constitution are not merely directory to the legislature, but themselves declare and fix a liability and are self-executing.

Willis vs. Mabon, 48 Minn. 150.
Whitman vs. Bank, 176 U. S. 559.

The liability, however, whether depending on the constitutional provisions as well as statutes or on statutes alone, is, though statutory in its origin, contractual and not penal, in its nature.

Pinney vs. Nelson, 183 U. S. 144.
Whitman vs. Bank, 176 U. S. 559, supra.
Bagley vs. Tyler, 43 Mo. App., 195.
Dennis vs. Court, 91 Cal. 548.
Hodson vs. Cheever, 8 Mo. App. 318.
Guerney vs. Moore, 131 Mo. 650.
Tinker vs. Van Dyke, 1 Flip (U. S.) 521.
Hawthorne vs. Calef, 69 U. S. 10.
Hobart vs. Johnson, 19 Blachf., 359.
Flash vs. Conn., 109 U. S. 371.
Western Nat'l Bank vs. Lawrence, 117 Mich. 669.

Howarth vs. Angle, 162 N. Y. 179.
Bell vs. Farwell, 176 Ill. 489.
Western Nat'l Bank vs. Reckless, 96 Fed. 70.
Coleman vs. White, 14 Wis. 762.
Gianella vs. Bigelow, 96 Wis. 185.
Rehbein vs. Rahr, 109 Wis. 137.
First Nat'l Bank vs. Gustin, 42 Minn. 327.
Hencke vs. Twomey, 58 Minn. 550.
Hanson vs. Davison, 73 Minn. 454.
Evans vs. Nellis, 101 Fed. 920.
Deweese vs. Smith, 106 Fed. 438.
Brown vs. Hitchcock, 36 Ohio St. 667-678.
Judson vs. Stewart, 7 Ohio N. P. Rep. 160.
Concord Bank vs. Hawkins, 174 U. S. 365, 372.
Howarth vs. Lombard, 175 Mass. 570.
Kirtley vs. Holmes, 107 Fed. 1.
Western Nat'l Bank vs. Reckless, 96 Fed. 70.
Richmond vs. Irons, 121 U. S. 27.

As regards its enforcement in foreign jurisdictions there is no essential difference between this liability and the liability for assessments for unpaid subscriptions for stock.

Howarth vs. Angle, 162 N. Y. 179-187.
Howarth vs. Lombard, 175 Mass. 570.
Whitman vs. Bank, *supra.*
Hancock Bank vs. Farnum, 146 U. S. 640.
Holland vs. Duluth, 65 Minn. 324.
Hanson vs. Davison, 73 Minn. 454.

The right to enforce this liability is not a mere matter of comity, but it is a right under the general principles of jurisprudence to enforce a contract.

Dennick vs. Railroad Co., 103 U. S. 11.
Western Nat'l Bank vs. Reckless, 96 Fed. 70.
Morawetz on Corp., Sec. 875.
Western Nat'l Bank vs. Lawrence, 117 Mich. 669.
Judson vs. Stewart, 7 Ohio N. P. Rep. 160.
Bell vs. Farwell, 176 Ill. 489.
Bank vs. Gustin, etc., Co., 42 Minn. 327.

The construction of the statute by the home court is binding on all other courts.

Cargill Co. vs. Minnesota, 21 Sup. Ct. Rep. 423.
Howarth vs. Lombard, 175 Mass. 570.
Hancock Nat'l Bank vs. Farnum, 176 U. S. 640.
Rice vs. Libbey, 105 Fed. 825.
Hancock Nat'l Bank vs. Ellis, 166 Mass. 414-418.
Brunswick Terminal Co. vs. Nat. Bank, 99 Fed. 635.
Bank vs. Rindge, 57 Fed. 279.
Rhodes vs. Bank, 66 Fed. 512.
McVicar vs. Jones, 70 Fed. 754.
Bank vs. Benson, 106 Wis. 624.

The proceedings in the home court are "binding on stock holders who are not before the court otherwise than by virtue of their membership in the corporation."

Childs vs. Cleves, 95 Me. 498.
Hancock Nat. Bank vs. Farnum, *supra.*
Howarth vs. Lombard, 175 Mass. 570.
Sheafe vs. Larimer, 79 Fed. 921.
Howarth vs. Ellwanger, 86 Fed. 54.
Hanson vs. Davison, 73 Minn. 454.
Holland vs. Duluth Co., 65 Minn. 324.
Town of Hinckley vs. Ry. Co., 80 Minn. 32.
Gaw vs. Glassboro N. Y. Co., 20 Ohio C. C. 416.
Dexter vs. Edmands, 89 Fed. 467.
Hawkins vs. Glenn, 131 U. S. 319.
Hale vs. Hardon, 95 Fed. 747.

This does not mean that it is conclusive against any stockholder that he is such, or that he has not discharged his liability, or that he has not offsets against the claim, but he is so far a part of the corporation that it is in other respects an adjudication against him.

Bank vs. Farnum, *supra.*
Hanson vs. Davison, *supra.*

Where the home court has thus construed the nature of the liability, and determined such to be the effect of the proceedings there, to refuse to give the same effect to such contract and proceedings in the courts of another state is contrary to the Constitution and Laws of the United States.

Huntington vs. Attrill, 146 U. S. 657.
Bank vs. Farnum, *supra.*

Under these decisions plaintiffs in error thus state their position:

1. If the right sought to be enforced has its origin in a self-executing provision of the state constitution, such right is transitory and is enforceable anywhere, and if the statute of the state does not provide a method of enforcement, the courts will enforce this right in any jurisdiction under the general principles of equity.

2. When the right is secured by statute alone, the liability, though statutory in its origin, is contractual in its nature, and enforceable as a contract.

3. When the stockholder purchases his stock he enters into a contract of liability under the constitution and statutes of the home state of the corporation, and thus he gives the creditors of such corporation a substantive right of action on contract, transitory in its nature, and enforceable anywhere that jurisdiction can be obtained of the stockholder, unless there is some provision in the statutes of the home state which confines the remedy to that jurisdiction alone.

4. Whether or not such right of action is transitory, and therefore enforceable anywhere, is determined by the interpretation of such contract as made by the court of last resort in such home state, and such determination by such court is conclusive, and binding upon all other courts in actions brought thereon, even if such other courts have given, or would give, a different interpretation to the same constitution and statutes.

5. Where such interpretation by the home court has been placed upon such contract, for a court in another jurisdiction to refuse to enforce such liability on the ground that the remedy is confined to the original action in the home state, is contrary to the constitution and laws of the United States, in that it denies full faith and credit to the public acts, records and judicial proceedings of such home state.

6. The supreme court of Minnesota has decided this constitutional provision to be self-executing and that the right of action under its laws and constitution to enforce this liability is a substantive right of action on contract, transitory in its nature, and of such a nature that its enforcement is not confined to the courts of that state or to the original action there brought, but that the judgment entered in such original action can be enforced by an ancillary action in any jurisdiction where any stockholder not brought into such original action can be found.

7. To refuse therefore to maintain this action in itself denies plaintiffs a right given by Sec. 1, Art. IV. of the Constitution of the United States and Section 905 of the Revised Statutes.

The Minnesota law.

The provision of the Minnesota constitution that fixes the liability of stockholders in banks is paragraph 3 of Sec. 13 of Art. 9, to-wit:

"Sec. 13. The legislature may by a two-thirds vote, pass a general banking law, with the following restrictions and requirements, viz: * * * Third—The stockholders in any corporation and joint association for banking purposes issuing bank notes shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of such corporation or association; and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders."

The provision of the statutes in question, appears unchanged in both the general statutes of 1878 and of 1894, those fixing the liability are these, General Statutes 1894:

"Sec. 2494 (being Sec. 14, Chap. 33, G. S. 1878): The shares in such bank are personal property, and transferable on the books of the bank in such manner as may be agreed upon in the articles organizing such bank, or prescribed in its by-laws; and every person becoming a stockholder therein shall, in proportion to his interest succeed to all the rights, and be subject to all the liabilities of prior shareholders: no change shall be made in the articles organizing such bank whereby the rights, remedies, or securities of existing creditors shall be in any manner impaired; and any association constituting such bank shall not be dissolved by the death or insanity of any one of the shareholders therein.

Sec. 2501 (being Sec. 21, Chap. 33, G. S. 1878): The president and cashier of every bank formed pursuant to the provisions of this chapter, shall at all times keep a true and correct list of the names of all the shareholders of such bank, with the amount of stock held by each, the time of transfer, and to whom transferred, and shall file a copy of such list in the office of the register of deeds of the county wherein such bank is located, and also in the office of the auditor of

state, on the first Monday in January and July in each year; *and the stockholders in each bank shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of such bank, and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders.*

Sec. 3419 (Sec. 414, Chap. 34, G. S. 1878): Persons holding stock in a corporation as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in the trust fund would be, if they were respectively living and competent to act, and held the stock in their own names."

And those providing for the enforcement of the liability are these:

"Sec. 5905 (being Sec. 17, Chap. 76, G. S. 1878): Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.

Sec. 5906 (being Sec. 18, Chap. 76, G. S. 1878): The court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.

Sec. 5907 (being Sec. 19, Chap. 76, G. S. 1878): If, on the coming in of the answer, or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment as in other cases.

Sec. 5911 (being Sec. 23, Chap. 76, G. S. 1878): Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment."

All of these statutes are specifically set out in the complaint (40-42). The section of the constitution is not there specifically set out, but is pleaded only in the general statement of the law of Minnesota as interpreted by its supreme court. The law of Minnesota as determined by that court of last resort under the constitution and statutes is pleaded in these words (43-46):

"That all the stockholders in such banks are liable for all debts of the bank in double the amount of stock held by them respectively in addition to the subscription price of said stock; that the proper method of enforcing such liability is, in the first instance, for a creditor to bring action at the domicile of the corporation, against the corporation and all of its stockholders, over whom jurisdiction can be obtained,

on behalf of all the creditors of such bank who shall come into said action so commenced and that judgment shall be therein entered in favor of each creditor in the amount owing him by said bank, and against each stockholder, over whom the court shall have acquired jurisdiction, in double the amount of stock held by him, but that no more shall be collected therein than is sufficient to satisfy such judgment in favor of said creditors, and that a receiver be appointed in said action to collect said judgment and to distribute the same to said creditors pro rata and also to enforce the liability of stockholders residing in jurisdictions other than that in which said suit is brought; *that the liability of such stockholders is several and not joint and that judgment against only a part of such stockholders does not have the effect of releasing others against whom no judgment was obtained in such action; that such action is not the exclusive remedy, but if any stockholders were omitted from such original action, because the court could not acquire jurisdiction of them, or for any other cause, the liability could be enforced against such omitted stockholders by proceedings against them in an action ancillary to the original action in any jurisdiction in which they might be found, and where they can be served with process; that the obligation of stockholders is not penal in its nature, but is purely contractual, and contains all the elements of a contract and can be enforced as such, and that an action to enforce such liability is an action on contract; that the judgment in such original action, determining the amount of the corporate debts remaining unpaid, is binding on the stockholders whether parties to the action or not; that the judgment against the corporation is in effect a judgment against the stockholders in their corporate capacity, and the stockholders are represented by the corporation in such action; that the decree in such action is a final and conclusive determination of the amount for which the stockholders are liable;* that the stockholders are so liable for all debts contracted both before and after they become stockholders; that all creditors who do not come into such action when required so to do by order under said section 5911 within the time therein allowed, are precluded from all benefit of the judgment, to be rendered, and from any distribution of the proceeds thereunder; *that where a person becomes a stockholder in a corporation organized under the laws of a foreign state he contracts with reference to all the laws of the state under which the corporation is organized, and that such laws become a part of his contract and that his liability as such stockholder may be enforced by creditors wherever they can obtain jurisdiction of the parties;* that in an action to enforce stockholders' liability in a jurisdiction where the corporation is a non-resident corporation, if judgment cannot be obtained against the corporation, such action will be maintained without judgment; that the double liability of stockholders in all banks imposed by section 2501 is not repugnant to the constitution; that the liability of stockholders is not an asset of the corporation and cannot be enforced by the assignee or receiver of the corporation in insolvency, but is a liability direct to the creditors; that it is not necessary for creditors to procure a judgment against the bank before commencing the suit to enforce the stockholders' liability; that liability of stockholders is a primary and principal one and not as surety for the corporation; that the liability of a stockholder survives

his death and is enforceable against his estate whether the corporate indebtedness was incurred before or after his death and whether the corporation became insolvent before or after his death; that he contracts for a liability which is to continue at least until his stock is transferred to another on the books of the company, and that the liability of the estate of a deceased stockholder for corporate debts is not a claim that can be presented to the probate court for allowance, but must be recovered in an action against the stockholders; that shares in such bank are personal property and transferable on the books of the company and every person becoming a stockholder therein shall, in proportion to his interest, succeed to all the rights and be subject to all the liabilities of prior shareholders; that a legatee is liable to an action by a creditor of the testator to recover the value of any legacy received by him, and that an executrix is liable to the amount of property of the estate in her hands."

The specific decisions pleaded are these:

Allen vs. Walsh, 25 Minn. 543.
Harper vs. Carroll, 62 Minn. 152.
Harper vs. Carroll, 66 Minn. 487.
Hanson vs. Davison, 73 Minn. 454.
Olson vs. Cook, 57 Minn. 552.
Danforth vs. National Chemical Co., 68 Minn. 308.
Holland vs. Duluth, etc., Co., 65 Minn. 324.
First Nat. Bank vs. Gustin, etc., Co., 42 Minn. 327.
Rule vs. Omega S. & G. Co., 64 Minn. 326.
Overmire vs. Haworth, 48 Minn. 372.
Dodge vs. M. P. Roofing Co., 16 Gil. 327.
First Nat'l Bank vs. Northern T. Co., 69 Minn. 176.
State vs. Bank of England, 70 Minn. 398.
American S. & L. Ass'n vs. Farmers & M. St. Bk., 65 Minn. 139.
Gebhard vs. Eastman, 7 Minn. 56 (Gil. 40).
Hencke vs Twomey, 58 Minn. 550.
Dent vs. Matteson, 70 Minn. 519.
Hantzch vs. Massolt, 61 Minn. 361.
In Re Martin's Estate, 56 Minn. 420.
Minneapolis B. Co. vs. City Bank, 66 Minn. 441.

ARGUMENT OF THE CASE.

The plaintiffs in error seek a reversal of the Wisconsin supreme court because that court has denied them the right to enforce in the courts of that state a contract solemnly entered into, on the ground that such decision is contrary to the constitution and laws of the United States.

The questions, therefore, presented are:

1. Does this decision deny a federal right?
2. Was such federal right "set up or claimed?"

Does the decision deny a federal right?

The decision denies a federal right if the nature of the cause of action here sought to be enforced is such under the constitution, statutes and decisions of the supreme court of Minnesota that it comes within the decision in Whitman vs. Bank and Bank vs. Farnum. That such is the cause of action appears in three ways: It is so set out in the complaint and admitted by the demurrer; it appears by an examination of the decisions pleaded, and finally it is admitted that such is the case by the Wisconsin court itself in its opinion.

The pleading of the Minnesota law certainly brings this case within the decision of Whitman vs. Bank and Bank vs. Farnum, and by the demurrer it stands admitted, if the pleading is here sufficient, and as to this no question is made.

The Minnesota decisions determine that such is the nature of the cause of action under the Minnesota law, and the doctrine of that court is especially declared in Hanson vs. Davison, 73 Minn. 454.

It seems sufficient at this point to refer to that case and to point out that the Minnesota court has determined that

This Provision of the Constitution is Self-Executing.—Bold Face.

Palmer vs. Bank, 72 Minn. 266-275, holds that this section of the constitution applies to banks of issue and that all banks, at least since 1869, organized under Chap. 33 of the General Statutes, as this bank was (3[illegible]), were banks of issue whether or not they issued circulating notes, and in *Seymour vs. Bank of Minnesota, 79 Minn.* 211-221, that such double liability rested upon all such stockholders under this constitutional provision until the legislature by Chap. 145, Laws 1895, withdrew this right to issue bank notes because of the long continued non-user. On the authority of *Willis vs. Mabon*, 48 *Minn.* 140, and *Whitman vs. Bank, supra*, this provision of the constitution is self-executing, as this last case says, "The words 'shall be secured' are not merely directory to the legislature to make provision for such liability, but of themselves declare it." So here the words "shall be liable" not only do not direct the legislature to make provision for such liability, but specifically declare it and in the opening sentence restricts the legislature from passing any law in derogation thereof. It says the legislature may pass a general banking law, but declares that any such law shall be subject to this here definitely declared liability. It is as the court declares in *Allen vs. Walsh*, 25 *Minn.* 543 (p. 551), a restriction on the power of the legislature. It does not turn the matter over to the legislature to declare a liability, but definitely declares the right and restrains the legislature from passing any law to remove or modify such right as to creditors of banks of issue. It comes then within the definition of Judge Mitchell in *Willis vs. Mabon, supra*, that (p. 150). "If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." The language construed in that case is identical for the purposes of this discussion. In that case it was "each stockholder in any corporation (except manufactur-

ing ones) shall be liable to the amount of stock held or owned by him"; here "the stockholders * * * shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of such corporation."

The legislature, in section 2501 (40), uses the identical words of the constitution, and even if chapter 76, which provides the method of enforcement, is taken to be a part of the same law as section 2501, yet it is not a part of the constitutional provision. The constitution secures the right, and it was in existence before the statute was passed. In the words of *Whitman vs. Bank* (p. 562), "A failure of the legislature to create courts or prescribe modes of procedure may, it is true, make ineffective this constitutional provision, but it does not destroy the liability; nor is it created by the act of the legislature prescribing the mode of its enforcement. This is the obvious meaning of the constitutional provision."

A further discussion of the Minnesota decisions except in connection with that of the Wisconsin court, seems unnecessary because as before suggested for the purposes of this discussion it is admitted by the demurrer that such is the law, and is also specifically admitted in the Wisconsin opinion.

The opinion of the Wisconsin court.

The statutes of Wisconsin provide (Stat. 1898, Sec. 2410):

"The supreme court shall give their decisions in all cases in writing, which shall be filed with the other papers in the case; and such decisions and all decisions and opinions delivered by the court or any justice thereof in relation to any action or proceeding pending in said court, shall remain in the office of the clerk. Every written opinion or decision of the supreme court which shall have been filed with the clerk shall constitute and be held a part of the record in the action or proceeding in which it shall have been given and filed, and shall be certified therewith to any court of the United States to which such action or proceeding or the record thereof may be in any manner certified or removed."

This court will therefore look into the three opinions returned here in this record, to-wit: 1. Opinion of Judge Marshall on the first appeal (reported in 106 Wis. 256) (76-94). 2. Dissenting opinion of Judge Dodge on the first appeal (reported in 106 Wis. 277) (97, 101). 3. Opinion of Justice Dodge on second appeal (reported in 111 Wis. 296) (111-113); for all of these have by this statute become an actual part of the record for the determining of what federal question was involved or passed upon.

Gross vs. United States Mortgage Co., 108 U. S. 477.

The court first admits that the liability is primary, absolute, and several, and by inference and reference to its own decision that it is contractual, and that the nature of the liability is precisely the same under the laws of Minnesota and Wisconsin.

It then asserts that the Minnesota court decided in Allen vs. Walsh, 25 Minn. 543, that (82) "the remedy, plainly indicated by the legislature, for the enforcement of the liability, is inseparably connected with

it and is exclusive," and that under this decision the complaint states no cause of action for two reasons (82): "1st. The statutory right coupled with the statutory remedy for its enforcement, clearly intended to be presented at the home of the corporation, is not transitory. 2nd. The action in a Minnesota court is a bar to any other action to enforce the liability of stockholders."

But it is useless to point out that the Minnesota court in Hanson vs. Davison, 73 Minn. 454, on p. 459, says that while it did use language in Allen vs. Walsh from which such inferences might be had, that such remedy is *not* exclusive, but that (461) "This statute presents the exclusive remedy only to the extent that an equitable action of the character therein indicated must be first instituted for the enforcement of the liability of stockholders," and that such action is not a bar, but that (p. 461) "There is nothing in the statute which justifies the conclusion that if a stockholder's liability is not enforced in the original action because he is a non-resident, an ancilliary action may not be brought against him alone after the amount for which stockholders are individually liable has been determined in the original action," or to discuss other Minnesota cases as determining the same position for the Wisconsin court specifically admits all this and says, (87): "It is contended that, admitting the rule above discussed—that where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive and cannot be pursued outside the home jurisdiction, as indicated in May vs. Black, it does not apply here, because we are dealing with a Minnesota law, and the supreme court of that state, in Hanson vs. Davidson, *supra*, has decided that the statutory remedy given there to enforce the liability under consideration, is only exclusive so far as it goes, that it requires an original action, by a creditor or creditors, in behalf of all persons so circumstanced who shall come into the action against all the stockholders of the bank within the jurisdiction of the court, and that the liabilities of all such stockholders must be there enforced, and the indebtedness of the corporation forming the basis therefor and for any action that may thereafter be brought in aid of the statutory action determined; that the statutory remedy does not preclude the institution and prosecution of ancillary action to reach stockholders, either in the home or other jurisdictions, that cannot be reached in the first instance, and that such stockholders by such actions may be pursued in any jurisdiction in Minnesota where they can be found, and in any foreign jurisdiction where the court will permit it. *Such is the state of the law as it now exists in Minnesota.*"

The Wisconsin court then goes on to say that the Minnesota court is wrong in its interpretation of Allen vs. Walsh, for Allen vs. Walsh and all the succeeding cases hold literally that the original action is the exclusive remedy and when the Minnesota court says in the Hanson case that such original action is not a bar and (89) "does not go so far as to preclude the institution and prosecution of an action ancillary to the principal action, against those who cannot be brought in in the first instance," it overturns "twenty years of established law at home and runs counter to the decisions of this and all other states where similar laws exist."

Again, that in order to sustain this new doctrine "arbitrarily grafted on to the existing system" that other actions may be brought in the home and other jurisdictions to enforce the liability as to those not originally brought in (90), "it became necessary to hold that the result in the first action, as to all questions necessarily there litigated, is binding not only on all persons made parties to such action, but all so circumstanced that they might have been made parties could they have been found within the jurisdiction of the court, and on all parties that might have been admitted as participants in the action upon their own application," with the result that some have their day in court, some are bound without that privilege, and those who come in have the equities between them adjusted, while the others do not, and that (92) "While the statutes of Minnesota as thus construed by its court are supreme in that state, their effect here depends upon the law of comity." And, citing from the dissenting opinion in Hale vs. Hardon (92), "that the decision in Hanson vs. Davison is so out of harmony with the previously established doctrine of the Minnesota court and with elementary principles, and so subversive of the rights of parties equally interested in a controversy to an equality of remedies, and to the right of every person to his day in court as to every material question involving his interest, that there is no rule of comity which requires or justifies its recognition in any other jurisdiction."

And "to give effect to the Minnesota statutes as now construed by its highest tribunal, would be unjust to the defendant, because it would, in effect, make a liability enforceable here that was not enforceable when it accrued and that could not have been enforced under the law of Minnesota as it existed prior thereto during the time the defendant was a member of the corporation," and after reciting the results that would follow says, (93) "For these and many other reasons that might be named *the law of Minnesota, as at present understood, should not be made effective here.*" The necessity of comity between states, and of a liberal policy in enforcing the laws of other states is then recognized and the opinion closes with these words "The conclusion reached is, that the complaint fails to state a cause of action *that can be entertained by the courts of this state,* and that the decision of the lower court to the contrary must be reversed, and the cause remanded for further proceedings according to law."

Now, as noted by the Wisconsin court, the Wisconsin law is identical with the Minnesota law and under it the court has always held that this liability is contractual, Coleman vs. White, 14 Wis. 762; Gianella vs. Bigelow, 96 Wis. 185, supra. It says at the beginning of this opinion that it is primary and absolute. It says again in Eau Claire Bank vs. Benson, 106 Wis. 624, (on pg. 629) referring to the Minnesota law, "that the added liability of stockholders is primary, contractual and absolute" and again under their own decisions in Rebbein vs. Rahr, 109 Wis. 136, that the liability of a stockholder in a bank is "strictly and distinctively contractual" (p. 140), and again (p. 151) "Substantially all courts, as above stated, have declared this statutory liability to be primary and absolute, a contract debt from each stockholder for which any creditor might sue and recover in full," that the liability is not as between creditors and stockholders, ratable or

proportionate, but limited only by the amount of his stock and the amount of the unpaid debts, it is primary and absolute and (p. 152) "The liability as between the stockholder and creditor is none the less several because, as between stockholders, it is proportional, nor because, as between creditors, the participation is *pro rata.*"

The Wisconsin court then is refusing to enforce a liability which it admits is primary, absolute, several, and contractual, solely because it holds that the original equity proceeding is a bar to this ancillary action. At the same time it admits that the Minnesota court has so interpreted its law that such former action is *not* a bar to this action. It says that the complaint under the Minnesota law as interpreted by the Minnesota court, states a cause of action, but "for the reasons assigned we refuse to give the same effect here," for to do so "would give effect to a law which is contrary to the policy of the law of this state."

This decision is then brought within the decisions of this court in Huntington vs. Attrill, 146 U. S. 657, and Bank vs. Farnum. In the Huntington case the action was brought in Maryland to enforce there a judgment recovered in New York against Attrill as a stockholder and director of a corporation. A demurrer to the bill was overruled by the lower court, but the court of appeals decided that the judgment was recovered for a penalty and not on contract (70 Md. 191) and concluding (p. 199) "It appears to us that the complainant has no cause of action, which can be maintained in this state," reversed the order overruling the demurrer and dismissed the bill. But this court said the cause of action was not penal in the international sense reversed the Maryland court and said (p. 685) that when judgments of a sister state were duly pleaded and proved "they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the right thereby adjudicated; and a refusal to give them the force and effect in this respect, which they had in the state in which they were rendered, denies to the party a right secured to him by the constitution and laws of the United States."

The case of Bank vs. Farnum is exactly with the case at bar on the facts. The action was brought in Rhode Island to enforce against a stockholder there his liability to pay a judgment rendered against a Kansas corporation in the United States court for the district of Kansas. A demurrer to the declaration was sustained in the lower court. On appeal (20 R. I. 466) the supreme court stated the claim presented on the appeal to be this (p. 468): "The law is construed in Kansas to constitute a contract; full faith and credit must be given to this construction, as a judicial proceeding in other states; hence the plaintiff is entitled to enforce in this state the liability of a stockholder in a Kansas corporation, as on a contract."

That court then said that the provisions of the federal constitution relates to statutes and decrees. It is these and not the opinions of courts and least of all a dictum of courts that are to have due faith and credit. It then construes the opinions of the Kansas court to be a dictum on this point, but held that even if the opinion of the supreme court of Kansas is that the relation of a stockholder to creditors is contractual, it is not binding, for it is not a judgment, and the pleading of the statute and such opinions does not set out a contract. It then construes

the Kansas law for itself and holds it does not constitute a contract and therefore (p. 471) "that the declaration does not state a contract under the laws of Kansas as construed by the decisions of the supreme court of that state to which we have been referred, nor by our own construction of it," and concludes, "The statutes of a state do not operate beyond its own limits, and comity between states does not require that one state should enforce the statutory provisions of another state which are contrary to the policy of its own laws."

It therefore sustained the demurrer and judgment was entered thereon.

On writ of error to this court (176 U. S. 640), this court in reversing the state court, refers to Whitman vs. Bank, 176 U. S. 559, where it had just decided, upon a review of the Kansas law, that the nature of this liability, though statutory in its origin is contractual in its nature and that an action thereon can be maintained in any court of competent jurisdiction, whether federal or state, and declares that the congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of another state in the words of Sec. 905 is that they "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

In other words, says, this court, the local effect must be recognized everywhere through the United States. It then inquires what is the effect given to the proceedings by the Kansas courts, and answers (p. 643), "This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Kansas. The law and usage in Kansas, prescribed by its legislature and enforced by its courts, make such a judgment not only conclusive as to the liability of the corporation, but also an adjudication binding each stockholder therein. We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has *not* claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it," and concludes (p. 644): "Now, as the judgment rendered in the Kansas court is in that state not only conclusive against the corporation, but also binding upon the stockholders, it must, in order to have the same force and effect in other states of the Union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. *The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered.* Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured."

As applied to the case at bar, these proceedings must be given in the Wisconsin courts the same force and effect they have in the courts of Minnesota. They are not given such effect in this decision. The Wisconsin court itself so declares. It is therefore in violation of the constitution and laws of the United States. The case at bar is clearer than the Farnum case, for here the Wisconsin court *specifically admits* that if the proceedings were to be given the same effect they have under the Minnesota law the complaint states a good cause of action, in the Wisconsin courts, but solely because the Wisconsin court refuses to give them such effect no cause of action is stated. The decision of the Wisconsin court is equally in conflict with Whitman vs. Bank, and Bank vs. Farnum, and denies plaintiff in error a right secured by the federal constitution and laws.

This is none the less the case, though no federal question is specifically mentioned or discussed as such in the opinion, as this court has frequently said in

Crowell vs. Randell, 10 Pet. 367.
Furman vs. Nichol, 8 Wall. 44.
Murdock vs. Memphis, 20 Wall. 590.
Kaukauna Co. vs. Green Bay, etc., Canal, 142 U. S. 254.

and many other cases discussed below on the question of jurisdiction where this court has gone so far as to say that a federal right is denied, if that is the result of the decision, even though the state court states in its decision that there is no federal question involved, as in Missouri, K. & T. R. Co. vs. Elliott, 184 U. S. 530.

The reasons given by the Wisconsin court.

The reasons given by the Wisconsin court are not satisfactory. In the words of Justice Dodge in his dissenting opinion (97), "The decision in this case seems to me to destroy a clear and absolute right by denying any remedy for its enforcement, and that, too, for no better reason than mere inconvenience to courts in their procedure, an inconvenience which seems to me rather imaginary than real. This is a result which is not to the credit of the courts and should not be reached without a struggle to avert it." The reasons for its decision are thus formulated by the Wisconsin court: *The statutory right, coupled with the statutory remedy for its enforcement, clearly intended to be presented at the home of the corporation, is not transitory.* But whether or not it is transitory is a question of the nature of the contract of liability, to be determined by the Minnesota court, and that the Minnesota court has so determined the Wisconsin court admits. Besides as is pointed out by the Minnesota court in Hanson vs. Davison, while the general action on behalf of all creditors is the exclusive remedy in the *first instance*, so that no other remedy can be used until this has been had, it does not at all follow that when such proceedings have been had and a decree therein obtained fixing the amount due from the bank to creditors who have come into the action and determining, as here, the amount of such debts that must be paid by the stockholders, that an action cannot be begun ancillary thereto to enforce said decree as against a stockholder who was not personally served in said action and against whom no personal judgment could be therein obtained. The

difference between entertaining such original suit in a foreign jurisdiction and an action in such jurisdiction to enforce the decree in the home jurisdiction has been frequently pointed out by other courts, for instance, in Howarth vs. Lombard, 175 Mass. 570; and in Tuttle vs. Bank, 161 Ill. 497. In this last case the court refused to entertain such original suit, but said when such proceedings had been had in the home court, they would be enforced against the local stockholder. Since the binding force of the decree obtained in such proceeding is recognized by the Minnesota court in Hanson vs. Davison and in Holland vs. Duluth Co., 65 Minn. 324, and by this court in the Whitman case and the Farnum case to be the same as in the case of an action to enforce an assessment for unpaid subscription to stock, one might as well say that no such assessment can be enforced against the local stockholder because the assessment made by the court having jurisdiction over the corporation is the exclusive remedy. Besides as above pointed out the liability does not originate in the statute, but in a self executing provision of the constitution which preceded it. Then, since it appears that the right here sought to be enforced is not created by the statute, even if it could not have been enforced without the statute, it does not for that reason come within the proposition that where a statute creates a new right and couples with it a remedy, that remedy is exclusive. Hanson vs. Davison even holds that this statute is not necessary for the remedy, but (p. 461) "If chapter 76 were repealed, equity would find an adequate remedy."

An examination of the statute itself by its own terms and as interpreted by the Minnesota court determines in fact that no new or exclusive remedy is therein provided (Sec. 5905) "Whenever any creditor of a corporation seeks to charge * * * the stockholders on account of any liability created by law, *he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.*"

(Sec. 5906) "*The court shall proceed thereon as in other cases* and when necessary shall cause an account to be taken of the property, and debts due to and from such corporation, and shall appoint one or more receivers."

(Sec. 5907) "If * * * it appears that such corporation is insolvent and that it has no property or effects to satisfy such creditors, the court may proceed without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders and enforce the same by its judgment *as in other cases.*"

Olson vs. Cook, 57 Minn. 552, is an action exactly like the original action, in the home court, in the case at bar. The court decides, 1, that an action may be brought under Chap. 76 to sequester the corporate assets of the bank and incidentally to enforce the statutory liability of the stockholders. 2. That an action may be brought to enforce the statutory liability and incidentally to sequester the corporate assets. But, 3, if the corporate assets have been put in the way of sequestration for the payment of debts by an assignment in insolvency, an action can be commenced for the sole purpose of enforcing the liability of the stockholders. That is the case at bar as pursued in the home jurisdiction, while the complaint here shows that such action did not go to judgment until after the entire assets of the corporation had

been applied toward its preferred debt to the state of Minnesota (33). In Northwestern Railroader vs. Prior, 68 Minn. 95, the court held the provisions of Chap. 76 are broad enough to allow a recovery for bonus stock in the same action, and said (p. 99) citing from Arthur vs. Willius, 44 Minn. 409: "In short, the proceedings are intended to be so elastic as to be susceptible of development during their successive stages of progress, as to reach not only all the corporate assets, but also all liabilities of stockholders and others so far as necessary for the payment of creditors."

In Oswald vs. Minneapolis Times Co., 65 Minn. 249, Justice Mitchell said (p. 254), "proceedings under chapter 76 being essentially equitable, as well as extremely flexible, in their nature, there is no difficulty in working out and enforcing through them the rights and liabilities, both legal and equitable, of all creditors and stock holders."

In McKusick vs. Seymour, Sabin & Co., 48 Minn. 158, Justice Mitchel said again (p. 170): "It is entirely consistent with the established equity jurisdiction, and in accordance with established equity practice, to forestall a multiplicity of actions by bringing all the litigation into its grasp in one suit for a general accounting and a complete adjustment of all rights."

In Pioneer Fuel Co. vs. St. Peter St. Imp. Co., 64 Minn. 386, the court held that in such action a cross bill would be allowed on application to enforce additional rights after the analogy of the equity practice.

In National N. H. Bank vs. Northwestern G. L. Co., 61 Minn. 375, the court said (p. 392): "In such case an action at law is not a proper remedy, or any action by a part of the creditors against a part of the stockholders, but a bill in equity should be brought by or on behalf of all the creditors against all the stockholders. Though not thus stated, this rule is applied in Allen vs. Walsh, 25 Minn. 543, Johnson vs. Fischer, 30 Minn. 173, McKusick vs. Seymour, Sabin & Co., 48 Minn. 158." And in Harper vs. Carroll, 66 Minn. 487, in paragraph 19 (p. 508), the court describes the action not as a special remedy, but as one that from the nature of the result to be attained, must be controlled by the ordinary rules of acourt of equity. It thus appears that the Minnesota court is announcing no new doctrine when it declares in Hanson vs. Davison (p. 461) that "The remedy for enforcing the liability must, in the first instance, from the nature of the liability, be an equitable action. G. S. 1878, c. 76 (G. S. 1894, c. 76) indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure. *This statute prescribes the exclusive remedy only to the extent that an equitable action of the character therein indicated must be first instituted for the enforcement of the liability of stockholders.*"

Such decisions as Pollard vs. Bailey, 20 Wall, 520; Bank vs. Franklyn, 120 U. S. 747, and others cited by the Wisconsin court, only apply when an attempt is made to enforce the liability of a stockholder in a foreign jurisdiction before the required proceedings in the home court have been had. Each of these two cases named was an action at law by a single creditor against a single stockholder in a foreign jurisdiction to recover from such stockholder for the benefit of such creditor alone. In each case the home statute prescribed a method, by a general

action to enforce the liability of all stockholders for the benefit of all creditors. In neither case had such proceedings been had. The decision in each goes no further than to say such action would not be maintained, until such proceedings in the lower court were had. That is precisely what was decided in Allen vs. Walsh, and all that was decided, as an examination of that case will show. When in Hanson vs. Davison for the first time the question came before the Minnesota court as to whether or not the proceeding under Chap. 76 was exclusive in the sense that a stockholder who could not be reached in such proceeding, could not be reached by an action ancillary to such proceeding, the Minnesota court determined that it was not, and says (p. 459-461), that Allen vs. Walsh decides simply that a single creditor cannot sue a single stockholder at law for his own benefit; that it was not there decided that if a stockholder was not brought into the original action, his liability could not be enforced against him afterward, either by bringing him or his property into that action or by commencing an ancillary action, for that purpose, in any other jurisdiction where he might be found; that there is nothing in the nature of his liability or the method of enforcing it that prevents this being done. Just so this court, when this new question comes before it in Bank vs. Farnum, answers it in the same way and sees nothing inconsistent with these former decisions in so doing. As to the Massachusetts cases cited, if they are not to be disposed of in exactly the same way, then it is to be taken that all these cases are overruled as to this question of "exclusive remedy," in Howarth vs. Lombard, 175 Mass. 570, when that court entertains such ancillary action and says with reference to the constitution and law of the State of Washington (p. 575): "Insomuch as the nature of it and the method of enforcing it depend upon the statute which enters into the implied contract, we must look to the statute to ascertain its extent and the manner of enforcing it. If it is of such nature as to call for local proceedings in the state where that corporation is, in order to adjust equities, such proceedings must be had, and it cannot be made effectual without them. Most of the cases in which creditors of foreign corporations have been refused relief in this commonwealth have shown rights which, under the statutes creating them, could not properly be enforced without proceedings in the foreign state whereby equities could be adjusted. In the present case, as the statute has been construed, it is plain that no action can be maintained against a stockholder until after proceedings in a court of Washington showing the insolvency of the corporation and the need of payment to satisfy the claims of creditors. *After such proceedings, and an adjustment of the rights and liabilities of the corporation, of creditors and of stockholders, collection can be made from stockholders wherever they are found.*"

The conclusion is then both on principle and authority that such original proceeding is the exclusive remedy only in the sense that it excludes any action at law by a single creditor against a single stockholder, and indeed all other actions to enforce the liability, until this proceeding is had. That, too, is the position of Justice Dodge in his dissenting opinion in the case at bar, where he says (99), "The assertion in Coleman vs. White (14 Wis. 762) that a general equitable suit with all creditors as plaintiffs and all stockholders within the jurisdic-

tion, together with the corporation, as defendants, is the exclusive remedy, could mean no more than that such remedy is exclusive of a direct action at law by one creditor against one stockholder when the equitable proceedure was neither obstructed nor exhausted."

The Wisconsin court say again (82):

The action in a Minnesota court is a bar to any other action to enforce the liability of stockholders.

This is in effect, as here applied, the same claim as that of exclusive remedy above. But if carried to its logical result it practically denies all remedy and thus annuls the right. No personal judgment can be obtained against stockholders not within the jurisdiction of the court prosecuting this general proceeding. If then practically all the stock is held by non-residents or in the names of non-residents, or if indeed such stockholders remove from the jurisdiction before they are served with process for the very purpose of evading same, creditors if they wait for their return, which may never happen, will lose their rights by the statutes of limitations, and if they go to judgment against the few within the jurisdiction they have forever released all those so evading their liability, and the proceeding becomes practically worthless. The manifest injustice to the honest local stockholder thus becomes apparent. The Minnesota court has frequently held, as in First Nat'l Bank vs. Winona Plow Co., 58 Minn. 167, Harper vs. Carroll, 66 Minn. 487, that the liability of the stockholder is as to creditors absolute to his full liability and not *pro rata*, and the Wisconsin court holds the same in Rehbein vs Rahr, 109 Wis. 136. If then fifty per cent of the liability of all would discharge the debts and one-half the stockholders are brought in to the home proceeding they must pay it all and if this proceeding is a bar, those who have evaded that action go scott free.

The Wisconsin court goes on to say that to sustain this "new doctrine" that further suits can be had against those not brought in it becomes necessary to hold (90) "That in an ancillary action all questions litigated in the principal action must be deemed at rest, so that while defendants in the first action have their day in court as to the vital questions standing at the threshold of their liability; those in actions subsequently brought are bound without having that privilege; that while some stockholders can have their equities as between themselves and associate stockholders settled in the action where their liability is enforced, others may be made to respond and to cancel their liability, and then be compelled to resort to some other action, in some other jurisdiction, to settle their equities with their associates," and "that this doctrine of Hanson vs. Davison is without support except in Hale vs. Hardon," and (92) "is so out of harmony with the previously established doctrine of the Minnesota court and with elementary principles, and so subsersive of the rights of parties equally interested in a controversy to an equality of remedies, and to the right of every person to his day in court as to every [redacted] question involving his interest, that there is no rule of comity which requires or justifies its recognition in any other jurisdiction."

That the decree against the corporation is binding on the stockholder without being personally served, as to the super-added liability, because, as Chief Justice Fuller said in Hawkins vs. Glen, 131 U. S.

319, "A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member" cannot be called "new doctrine," since Howarth vs. Lombard, 175 Mass. 570, *supra*, Childs vs. Cleaves, 95 Me. 498, *supra*, and other cases above cited, certainly not since Bank vs. Farnum, and when this court in the Farnum case cited Hawkins vs. Glen in support of this position, it endorsed the claim of the Minnesota court in Hanson vs. Davison, and Holland vs. Duluth, 65 Minn. 324, *supra*, that there is no difference in this regard whether the action be to enforce an assessment for unpaid stock or to enforce the so-called statutory liability, thus bringing to the support of Hanson vs. Davison the long line of cases brought on stock subscriptions, of which Hawkins vs. Glen is the leading one.

To support such action discriminates against the local stockholder.

As to the claim that the non-resident stockholder is thus denied an equality of remedies and is thus unjustly discriminated against practically means nothing more than that he is thus deprived of the advantages of contribution as against his fellow stockholders. It would seem a sufficient answer to say that it is not only his privilege but his duty to come into such original action, and if he does not do so he ought not to complain. The court tries here to distinguish the Minnesota statute from the Kansas statute. But it is difficult to understand how it can be more equitable to enforce under the Kansas statute where there can be no contribution in the original action, than under the Minnesota statute where such relief is given to all that come in, and all may so do. In Childs vs. Cleaves, 95 Me. 498 (p. 517) the court discusses the Minnesota statute and says it "is seen to be free from the less equitable features of those statutes which authorize a single creditor, without a *pro rata* assessment, to maintain an action against a single stockholder for his own benefit and not for the benefit of all the creditors."

The proposition that the Wisconsin court makes is that it is more in accordance with sound public policy and good morals that a stockholder by evading the original action should escape his contract liability rather than be put to the annoyance of enforcing contribution thereafter if the necessity and occasion so to do should fall upon him. But as Justice Dodge says, in the case at bar, it appears that the debts largely exceed the liability of all solvent stockholders and as the court said in Mason vs. Alexander, 44 Oh. St. 318-335, the question of contribution does not arise, and if it did it is, as the court said in Hanson vs. Davison "subordinate to the equities of the creditors, as he can secure such contribution by appearing in the original action." And "it certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations toward creditors of the corporation which they have assumed by becoming stockholders." Bank vs. Ellis, 172 Mass. 39-47.

In Guerney vs. Moore, 131 Mo. 650, the court says it does not at all follow that because there is no such added liability in Missouri that the courts of that state will refuse to enforce the contracts of its citizens who voluntarily go into other states and assume such liability by becoming stockholders (p. 673). "Such a contract is not against public policy. It contravenes no principles of good morals and has no mis-

chievous tendency. It is not in any sense repugnant to our ideas of honesty or injustice."

In Howarth vs. Lombard, 175 Mass. 570-576, the court says: "We see no injustice to the defendant in holding him here to the performance of the obligation which he voluntarily assumed in another state." The court in Hale vs. Hardon (p. 572) characterizes the decision in Marshall vs. Sherman, 148 N. Y. 9, as "in the direction of repudiation, subversive of judicial right and of justice and fraught with danger to the idea of permanent and uniform rule," and says the real question involved "is a question of right—a question whether an unquestioned liability shall be enforced outside of the parent forum after all has been done there that can be done, or whether the unquestioned right shall exist without a remedy," and again (p. 755) "It was not understood that the statutory liability should have no force unless the non-resident stockholder was made a party to the proceedings as to corporate affairs which the statute intended and expressly provided should be had in the district courts of Minnesota. Making a non-resident stockholder a party to the contemplated legal and equitable proceeding for such purpose was a thing impossible and a construction requiring it would render the statutory liability inoperative at its inception."

In Dexter vs. Edmands, 89 Fed. 467 the court said (p. 470): "I find it difficult to imagine what would be the condition of this government if the federal courts should refuse, on any of the grounds just mentioned, to recognize and enforce the right arising under a state statute which had been formally adopted, and was not contrary either to the constitution of the United States or that of the state adopting it."

In Kisseberth vs. Prescott, 91 Fed. 611, the court said (p. 613): "I do not think that the enforcement of the creditors rights against the stockholder is meant to depend upon the ability of the stockholder to secure contribution in the same jurisdiction in which he is himself sued. The defendants contend that the remedy given by section 1204 (securing right of contribution) is confined to the jurisdiction of Kansas. Such a limitation would leave the remedy practically worthless to the creditor, while imposing upon the stockholder found in Kansas a burden, which stockholders not found there would not fully share. I find no evidence in the statute of an intention thus to discriminate against the Kansas stockholder."

The progress of the courts of Massachusetts from Erickson vs. Nesmith, 4 Allen 233, to Howarth vs. Lombard, is very marked and it is very evident that that court does not regard its change as made against good morals or true public policy but quite the contrary, and has laid down as the basis of its present position that elementary justice requires that one should not be allowed to evade his contract because of a fancied technical difficulty of method of enforcement. Attention has frequently been called to the growth of the courts toward enforcing this liability in foreign jurisdiction as in Hale vs. Hardon and Childs vs. Cleaves. This decision of the Wisconsin court is a distinct step backward and while supported on the ground of equity makes distinctly for the contrary. As Justice Dodge says again (100) "Is it not the part of justice to vindicate the clear rights of the plaintiffs in this case

where it is obvious that no undue or unequal injury will be done the defendant, rather to perpetrate certain wrong on the plaintiffs from mere apprehension that under some other circumstances it might not be easy to fully protect a defendant. If either is to suffer, should it rather not be the stockholder, who by the same diligence she finds easy when demanding her dividends could have informed herself of the general litigation; and by appearing therein, have protected herself from any inequality? I the more deplore this decision because it diminishes the solvency of our own banks and denies to their creditors the liability of any stockholders who by reason of non-residence or otherwise may escape the process of the court in which the general equity suit must be prosecuted. It invites fraud and evasion by offering exemption to stockholders upon the easy expedient of placing their holdings in the names of non-residents. These are evils which with the probable drastic legislation to avert them, seem to me much more terrible than the inconvenience of courts or incongruity in mere forms of procedure."

Rights under a former construction.

The court urges as a further reason for its decision that (92) "To give effect to the Minnesota statutes as now construed by its highest tribunal, would be unjust to the defendant, because it would in effect, make a liability enforceable here that was not enforceable when it accrued and that could not have been enforced under the law of Minnesota as it existed prior thereto during the time the defendant was a member of the corporation" and the brief of the defendant in error on the motion for certiorari, says (p. 18), the settled construction of a statute is a part of the contract and a change of decision is equivalent to a repeal or amendment, citing the federal cases to that effect. But the answer is, that the Minnesota court says there has been no new construction and this seems borne out by an examination of the decisions. The principle too invoked would on the facts seem to have no application. The right that is here claimed for defendant is the right to escape liability provided she is a non-resident or provided she removes from the jurisdiction before service is made upon her. For there is here no distinction between the actual non-resident and the one that removes to escape service. If there had been a change of construction of the statute by the Minnesota court the right to escape liability by a technical evasion would seem not to come within the principle invoked. But as above shown all that was decided in Allen vs. Walsh was that a single creditor could not sue a single stockholder at law for his exclusive benefit. All the language therein used, that would seem to say that such original action was a bar to further proceedings, is dicta and the Minnesota court so declared in Hanson vs. Davison.

The Wisconsin court concludes (93): "This court recognizes fully the importance of interstate comity and uniformly freely gives effect to it as regards the laws of sister states when it will not seriously violate the policy of our own laws or the rights of our own citizens. Tested by that standard and the most liberal rules usually applied to the subject, courts of this state cannot lend their aid in the circumstances presented in the complaint before us. A liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within

reasonable limits." This is exactly the position taken by the Rhode Island court in Bank vs. Farnum, when this court held that nevertheless when it refused to enforce the transitory right of action it violated the federal constitution and law. In the Farnum case, too, the state court denied that the home state gave its laws such a construction that made the right of action transitory, here it is admitted.

The conclusion is that the Wisconsin court denies a federal right in arriving at its decision because it explicitly refuses to give force to the cause of action admitted to be transitory as interpreted by the Minnesota court, and the reasons given for so doing makes more clear the violation of such right.

Further claims of defendant on motion for certiorari.

The brief of the defendant in error in reply to the motion for certiorari, makes further claim, that the Wisconsin court might have rested its decision on some non-federal question, but the first answer is that it did not and the second is that none are pointed out which are broad enough to support a decision. All the matters suggested would be matters of defense on the trial if they have any force. For instance, it is claimed that (p. 19) part of the debts of the bank may have been barred by the statute of limitations. Such, if true, might be a partial defense, but not a ground of demurrer. But there is no such question, for the commencement of proceedings tolled the statute both as to the bank and the stockholders. London, etc., Co. vs. St. Paul, etc., Co., 84 Minn. 144. Potts vs. St. Paul A. P. Assn., 84 Minn. 217. Again it is suggested that some of the stockholders had been settled with. But it is admitted by the demurrer such were insolvent except in two cases representing a liability of $3.400.00, and that as to these all was collected that could be (50). This liability is not ratable or proportionate. Rehbein vs Rahr, 109 Wis. 137 supra, and therefore the authorities cited have no application. In any event since the complaint shows that every solvent stockholder must respond to his total liability, she could not be prejudiced because it is no concern of hers unless the settlement with another increased her liability. Howard vs. Glen, 85 Ga. 238. Bennett vs. Glen, 55 Fed. 956.

Was the federal question sufficiently set up or claimed in the state court?

The record shows the claim to be made:

1. By the allegations in the complaint (43-46). It is alleged and admitted by the demurrer that liability is several and not joint, absolute and not contingent and contractual, and not penal; that by becoming a stockholder one agrees that the Minnesota laws are part of his contract and that the action to enforce the liability thereunder is an action on contract; that the original action is not the exclusive remedy but an ancillary action against any omitted stockholder may be brought in any jurisdiction where he may be found; that the original judgment does not release those not brought into the original action but is binding on all such, as in effect against them in their corporate capacity in an action to enforce same in any jurisdiction where they may be found. To refuse to enforce such a cause of action is neces-

sarily a denial of the federal right. It is true the pleader might have alleged also that to refuse to entertain the action is contrary to the federal constitution and laws, but this is a necessary inference, and to set it out seems, on its face, bad pleading. Plaintiffs did not suppose, and had no right to assume in the first instance that the court would so refuse, to entertain the suit.

This case is analagous to those below cited, where a state statute is pleaded as constituting a contract. It is not necessary to plead that to refuse to enforce it is contrary to the federal constitution as impairing a contract. Such is Bridge Proprietors vs. Hoboken Co. and others cited below.

Further, this action is based on the "acts, records and judicial proceedings" of another state and this court has held that if such proceedings in another state are set up as the foundation of the cause of action and the state court denies them the effect claimed, or, as here, denies them any effect, then this court has jurisdiction.

Green vs. Van Buskirk, 5 Wall. 307.
Same case, 7 Wall. 139.
Crapo vs. Kelly, 16 Wall. 610.
Dupasseur vs. Rochereau, 21 Wall. 130.
Carpenter vs. Strange, 141 U. S. 87.
Roby vs. Colehour, 146 U. S. 153.
Huntington vs. Attrill, 146 U. S. 657.
Dowell vs. Applegate, 152 U. S. 327.
Great Western Telegraph Co. vs. Purdy, 162 U. S. 329.
Pittsburgh etc. Ry. Co. vs. Loan & Trust Co., 172 U. S. 493, 507.
Hancock Nat. Bank vs. Farnum, 176 U. S. 640
Jacobs vs Marks, 182 U. S. 583.
Nat. F'dry vs. Oconto etc. Co., 183 U. S. 216, 233, and other cases below discussed.

2. It appears by the affidavit of A. J. Vinje, circuit judge (p. 12, motion for certiorari) the attorney for plaintiffs in error, when the case first came before that court (in which the action was originally brought) on demurrer in a brief and oral argument, "duly presented to the court and duly claimed that the statutory liability of stockholders to creditors is a substantive right of action arising on contract enforceable in any jurisdiction, and that to refuse to enforce in the courts of the state of Wisconsin, the cause of action set out in plaintiffs complaint, would be contrary to the constitution and laws of the United States, in that it would be a refusal to give due faith and credit to the proceedings of the courts of the state of Minnesota."

It thus appears that the fact of a federal question being involved was brought to the attention of that court at the earliest possible moment. In fact, though it does not appear, this judge overruled the demurrer on this ground.

3. The rules of the supreme court of Wisconsin provide (pp. 4-5 motion for certiorari) that (rule IX) "Each party shall prepare and print a brief. * * * The brief of the appellant or plaintiff in error must contain a concise statement; (1) the nature of the action and the issues involved; (2) the result of the trial or hearing in the court below; (3) *the several errors relied upon for reversal;* (4) in cases

depending upon the evidence, the leading facts or conclusions which the evidence establishes or tends to prove; (5) the principles of law applicable to the case, and the authorities in support of same. The brief of the respondent in error may point out any insufficiency or inaccuracy in the brief of the opposite party, and supply, correct and answer the same in the order indicated; and may also in the cases indicated, state any leading facts or conclusions which the evidence establishes or tends to prove, and any principles of law applicable to the case, and the authorities in support of same," and that (rule XVIII) "Before calling the calendar cause, the plaintiff in error or appellant shall file with the clerk eight copies of the printed case, and each party eight copies of the printed brief. The clerk shall deliver one copy of each to each of the justices, to the reporter and to the state librarian."

In accordance with these rules on the first appeal to the Wisconsin supreme court these plaintiffs in error duly filed as respondents their brief which by the order of this court has been made a part of the record here, and is marked "*Respondent's Brief.*" In said brief, plaintiffs in error duly claimed (p. 36) (this also appears in motion for certiorari, pp. 14-18):

"The question before this court is in short this: Will this court refuse to enforce the solemn contract of this defendant, entered into under the laws of Minnesota, simply because she is a resident of the state of Wisconsin, the laws, their interpretation and the methods of enforcement of the two states, being practically identical? A question whether an unquestioned liability shall be enforced outside of the parent forum after all has been done there that can be done. * * *

"To decline to maintain this action is to refuse to enforce a contract because made in another state, and is a simple refusal of justice; it is to declare that an unquestionable right shall go without a remedy."

And under this general proposition plaintiffs in said brief, duly presented the following claims (pp. 36-51) citing the authorities under each claim:

"A cause of action arising on contract is a substantive right, enforceable everywhere."

"The statutory liability of stockholders to creditors is a substantive right of action arising on contract."

"A right of action arising on a statute is just as enforceable in any other state as a right of action under the common law."

"The principle applied in these cases applies with equal force to the statutes enacting liability of stockholders."

"This action then is really one to enforce a valid contract as much so as if it were a promissory note made in the state of Minnesota; and to refuse to entertain this action is a refusal to enforce a contract simply because it was made in another state, and to refuse to recognize the validity of a solemn and just contract."

And also (pp. 64-81):

"This action is ancillary to the decree entered in the Minnesota court. The proceedings there had are binding on the stockholders

everywhere, and to refuse to maintain this action is to refuse to give due faith and credit to the judgment of a sister state.

"1. This is an ancillary action.

"As twice before suggested in this brief, the question here arising is quite other than the one usually in such cases, in that this case is ancillary to exhaustive proceedings in the home jurisdiction. The considerations here presented are such that a court might readily maintain this action where it had before declined to maintain an original action." (P. 64).

"2. The judgment in the Minnesota court is binding here."

"4. (P. 79) Not to enforce plaintiffs' judgment is to refuse to give due faith and credit to the judgment of a sister state."

"In Huntington vs. Attrill, 146 U. S. 657, the facts are, a judgment was recovered in the state of New York under the statutes of New York against the defendant in 1863 for his liability as a stockholder and officer in a certain corporation. An action was brought in the state of Maryland to enforce the New York judgment. The court of appeals of Maryland sustained the demurrer to the bill on the ground that the judgment obtained in New York was in the nature of a penalty. A writ of error was issued out of the U. S. supreme court, and that court, in an elaborate and exhaustive opinion, holds that the refusal of the Maryland court to enforce said judgment was contrary to the constitution, in that it did not give due faith and credit to the judgment rendered in the New York court."

Citing also Pelzer Mfg. Co. vs. Fire Ins. Co., 71 Fed. 826, and Central Trust Co. vs. Railroad Co., 65 Fed. 257, and quoting therefrom the words of the court, that

"A refusal to give it (the judgment) the force and effect in this respect which it has in the state in which it was rendered, denies to the judgment creditor a right secured to him by the constitution and laws of the United States."

It thus appears that plaintiffs in error, since they were respondents on that appeal, presented the federal question to the supreme court of Wisconsin *in the only way it could then be done* under the law and practice in that court. Being respondents they could neither take exceptions in the court below or assign errors on appeal.

4. When the case was sent back to the circuit court for further proceedings plaintiffs in error attempted twice (as defendant in error has placed before this court in his brief on motion for certiorari, p. 3), to amend their complaint by inserting therein the words "that for the courts of Wisconsin to refuse to enforce said judgment and decree is contrary to the constitution and laws of the United States, but more especially in this, that by the constitution and laws of the United States the said judgment and decree must be given the same force and effect in the state of Wisconsin that it has in the state of Minnesota, and that to refuse to enforce said judgment and decree against said defendant

in the state of Wisconsin, is contrary to the constitution and laws of the United States, in that it does not give full faith and credit in said state of Wisconsin to the public records and judicialproceedingsofthe state of Minnesota, and does not give to such records and judicial proceedings such faith and credit in the courts of Wisconsin as they have by law and usage in the courts of Minnesota."

Which motions to amend were denied. (Same brief, p. 6).

Certainly plaintiffs cannot be prejudiced by this showing. On the contrary it shows they were insisting at every step that there was a federal question involved, and bringing such question to the attention of the court. Whatever the court's reason for denying the motion, it could not so deny without having in mind the federal question thus presented.

5. The demurrer was again brought up for hearing before the the circuit court, whereupon that court (102) ordered the demurrer sustained and the complaint dismissed. To this order plaintiffs in error duly excepted, as follows (102-103):

"To the above and foregoing order and each and every part thereof plaintiffs except.

"The plaintiffs also duly excepted to the said order of the court made herein sustaining the demurrer to said complaint and dismissing the complaint on the ground that it denies them a right given by Sec. 1, Art. 4, of the Constitution of the United States, which reads:

> "'Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.'

"And the following statute passed in pursuance thereof, to-wit:

> "Revised statutes of the U. S., Sec. 905: 'The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

"And that said order and decision is contrary to said provisions of the constitution and laws of the United States.

"E. W. HELMS, *Circuit Judge.*"

These exceptions were duly signed by the judge.

Defendant's brief on motion for certiorari suggests that this exception could not avail in the supreme court of Wisconsin because not embraced in a bill of exceptions. But an appeal from a judgment dismissing a complaint brings up the order sustaining the demurrer on which the judgment is founded. *American, etc., Co. vs. Gurnee*, 44 Wis. 49; *Moritz vs. Splitt*, 55 Wis. 441; *State vs. St. Croix Co.*, 83 Wis. 340-344. And no bill of exceptions was necessary on appeal from the judgment of the circuit court to the supreme court of Wisconsin. *Lewis vs. Chicago & N. R. Co.*, 97 Wis. 368; *Dow vs. Deissmer*, 105 Wis. 385; *Town of I. R. vs. Bayfield County*, 106 Wis. 587. Justice Dodge also suggests (112) that this exception was not properly before that court as an exception because not in a bill of exceptions. But a bill of exceptions not being necessary, and all objections to the proceeding in the court below being available in the supreme court without such bill of exceptions, such a bill would have been both useless and void. But such exception so taken does serve to show to this court that it was duly brought to the attention of the circuit court that its decision was in violation of the federal right.

6. Plaintiffs in error duly appealed to the Wisconsin supreme court from the judgment entered on said order, and duly filed their brief under the foregoing rules. A copy of this brief is by order of this court made a part of the record here, and is marked "*Appellant's Brief*." In this brief plaintiffs in error duly made their assignments of error as required by said rules in these words: (P. 3.) (Motion for Certiorari, p. 19.)

"The circuit court erred:

"1. In sustaining the demurrer.

"2. In ordering the action dismissed.

"3. In ordering and entering judgment of dismissal.

"4. In that it denied plaintiffs a right given them by Sec. 1, Art. 4, of the Constitution of the United States, and by Sec. 905 of the Revised Statutes of the United States, that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and that said records and judicial proceedings shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

And in enforcing these assignments appellants made the following propositions, all of which were duly supported by citations of authorities as therein appears, to-wit:

"The liability here sought to be enforced is, though statutory in its origin, contractual in its nature." (P. 6.)

"There is no essential difference between this liability and the liability for unpaid assessments on stock." (P. 7.)

"The proceedings in the Minnesota court are binding on stock-

holders who are not before the court otherwise than by virtue of their membership in the corporation." (P. 7.)

"The construction of the Minnesota statute by the Minnesota court is binding on all other courts." (P. 7.)

"The right to enforce this liability is not a mere matter of comity, but is a right under the general principal of jurisprudence to enforce a contract." (P. 8.)

And says (p. 8):

> "If I understand these decisions rightly they hold that if the liability is contractual the cause of action is transitory, that whether or not it is contractual and therefore transitory depends on the construction of the laws by the court of last resort in the home state of the corporation; if such court has construed such laws so as to give a contractual liability such right of action on contract can be enforced anywhere, whether it be done under the general principles of jurisprudence or be regarded as a matter of comity, and where the action in the foreign forum is an ancillary action in aid of the proceedings already had in the home forum, a refusal to entertain such suit by the foreign court is contrary to the constitution and laws of the United States, which require that the *same* faith and credit must be given these proceedings in other states to which they are entitled in the state in which they were had."

And concludes as follows (p. 19):

> "Now this court said (syllabus) in Eau Claire Nat'l Bank vs. Benson, 106 Wis. 624: 'The constitutional or statutory liability of stockholders of a corporation to its creditors, created by the laws of the state of Minnesota, must be held to be of the same nature here as by the highest court of such state, and that that court having determined the nature of such liability this court is bound thereby.' And in Finney vs. Guy this court refuses to enforce the Minnesota law because (p. 625) '(1) The statutory right coupled with the statutory remedy for its enforcement clearly intended to be pursued at the home of the corporation, is not transitory. (2) The action in a Minnesota court is a bar to any other action to enforce the liability of stockholders', but this court admits (p. 271) that under Hanson vs. Davison the right of action is (p. 271), (1) Contractual and transitory, (2) Does not provide a special remedy enforceable only in the original action. (3) Is not barred as to stockholders not brought into the original action. Then under the admissions in the decision itself Finney vs. Guy is contrary to the federal constitution and laws, on the authority of Hancock Bank vs. Farnum and Whitman vs. Bank, for it specifically refuses (p. 275) 'to give effect to the Minnesota law as now construed by its highest tribunal', and says for reasons named (p. 276) 'The law of Minnesota, as now understood, should not be made effective here.'"

The federal question was thus squarely presented to the supreme court of Wisconsin. This court has frequently decided that it is sufficient if the federal question is presented to the state court of last resort whether or not is was so presented in the lower courts of the state, as in Sully vs. American Natl. Bank, 178 U. S. 289.

As above shown the federal question was presented to the supreme court of Wisconsin on the first appeal in the only way it could then have been presented. It was remanded for further proceedings in the circuit court. On such proceedings the federal question was there presented by exceptions. On the appeal from the judgment of the circuit court it was held by the Wisconsin court, following this court in Great Western T. Co. vs. Burnham, 162 U. S. 339, that such judgment was open for review in the supreme court (113), and on such review the federal question was again presented by these assignments of error and brief thereon, all in accordance with the rules of that court. The Wisconsin court held, again in accord with the holding of this court, that it would not reconsider any question decided on the former appeal, and that since on the former appeal (113) "it decided unambiguously that the complaint fails to state any cause of action maintainable in our courts" the action of the lower court in entering judgment on the demurrer was right and must be affirmed "no matter what new or different arguments might now be urged against the correctness of the conclusion then reached." Now it would seem that under Whitman vs. Bank, Bank vs. Farnum, Huntington vs. Attrill and the other cases that the Wisconsin decision on its face denies the federal right, in deciding that no cause of action that would be maintained in Wisconsin, was stated. Estoppel by judgment upon the complaint "extends only to the exact point raised by the pleadings or decided." Wiggins Ferry Co. vs. O. & M. Railway, 142 U. S. 396, 410. And in any case a former decision is only *res adjudicata* as to *questions actually passed upon or necessarily involved*.

Russel vs. Place, 94 U. S. 606.
Carroll vs. Lessee of Carroll, 16 How. 275-286.
St. Louis Ry. vs. Terre Haute Ry., 145 U. S. 393-403.
Pollock vs. Farmers L. & T. Co., 157 U. S. 429-574.
Bardes vs. Bank, 178 U. S. 524-534.

The law of the case on the second appeal of a case goes no further than this. "The principle is sharply limited to decisions on a prior appeal on points necessary to a determination of the cause." 2 Enc. Pl. & Pr. 381. In the words of this court in Barney vs. Winona, etc., Ry. Co., 117 U. S. 228-231:

> "We recognize the rule that what was decided in a case pending before us on appeal, is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision."

If, then, this decision involves a federal question, as we think it is shown it does, then the refusal to consider such question on the second appeal is a declaration by the Wisconsin court that such question was

either *directly passed upon on the former appeal, or that it was necessarily involved* in arriving at the conclusion "that the complaint fails to state any cause of action maintainable in our courts." In either case, as the citations below show, this court has jurisdiction.

7. The chief justice of the supreme court of Wisconsin made the following certificate (6):

"I am requested by the attorney for the plaintiffs to state, as the fact is, that upon the hearing of this court, he argued orally, and in his printed brief, that not to enforce the judgment of the Minnesota court was to refuse to give due faith and credit to the judgment of a sister state."

In considering the question of jurisdiction it has been the practice of this court to give weight to the certificate of the chief justice of the state court.

Murdock vs. Memphis, 20 Wall. 590, 633.
Roby vs. Colehour, 146 U. S. 153, 160.
Powell vs. Brunswick County, 150 U. S. 433, 439.
Gulf etc. Co. vs. Hewes, 183 U. S. 66.

Though it was always held this was not in itself sufficient to confer jurisdiction, but that its office is "to make more certain and specific what is too general and indefinite in the record." But plaintiffs in error claim the decisions of this court show the federal right was sufficiently "set up or claimed" to give this court jurisdiction because it appears,

1. *The federal question was necessarily involved.* The decision could not be arrived at without denying the federal right.

2. *The federal question was called to the attention of Wisconsin supreme court.* The complaint states in explicit terms a transitory cause of action and the demurrer admits it. It was presented on the first appeal by "*respondent's brief*," and on the second appeal by the assignments of error and "*appellant's brief*."

3. *That court explicitly declares the law of Minnesota, as now understood, shows a transitory right of action.*

4. *The right was claimed in the only way feasible under the practice of that court.*

5. *The refusal of that court on the second appeal to consider the federal question, because of the law of the case, was a declaration that the federal question was necessarily involved in the first decision.*

6. *The pleading of the records and proceedings of the courts of another state as the foundation of a cause of action is itself an assertion of the federal right.*

Review of the cases on the question of jurisdiction.

In Crowell vs. Randell, 10 Pet. 367, this court reviewed all its former decisions on the question of its jurisdiction, in cases of writs of error to state courts and from such review concludes that although

it is necessary that a federal question must have arisen and been decided by the state court, it is not necessary (pg. 397) "that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis;* but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment."

In Armstrong vs. Treasurer Athens County, 16 Pet. 279, this court again summarized it to be the law of this court, that jurisdiction must appear in the record, in one of six methods, two of which are these (pg. 284):

"1st. Either by express averment, or by necessary intendment in the pleadings in the case.

"6th. It must appear from the records, that the question was necessarily involved in the decision; and that the state court could not have given the judgment or decree which they passed without deciding it."

In Bridge Proprietors vs. Hoboken Co., 1 Wall. 116, it was claimed that plaintiff had by statute an exclusive right from the state of New Jersey to maintain a bridge across the Passaic River and that a subsequent statute giving defendant a right to build a railroad over the same river violated such contract right. The bill was for an injunction. From the statement of the case it appears that the allegations from which a federal question arose were to the effect that by virtue of such statute plaintiff had a contract with the state, that no other persons should erect any bridge, which contract the state could not by any law impair, and that the defendant claimed that the state was not bound by any such contract. It appears that the chancellor in deciding the case in the state court said in his opinion that such a contract is within the protection of the provision of the constitution declaring against the impairing of contracts, but as is noted (pg 123) such opinion was then no part of the record nor strictly in evidence even. The sole record as to a federal question was the statement in the bill that by virtue of the statute the state had entered into a contract which by law it could not impair, and the answer of the defendant that the state did "not contract." Justice Miller recites that it was objected that the pleadings do not in words say the statute is void because is conflicts with the federal constitution nor point out the clause violated, but declares that it would be a new and superfluous rule of pleading if the party must set out specially the provision on which he relies; that thise court takes judicial notice of the constitution of the United States without pleading and said (pg 124) "and if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court can surely recognize the fact without requiring the pleader to say in words, "This paragraph of the constitution is the one involved in this case."

In Furman vs. Nichol 8 Wall 44, the charter of a state bank made its bills receivable for taxes. This provision was repealed and Furman tendered some of these notes for taxes and brought this action in man-

damus to compel the clerk to receive them. The petition averred only, that the charter was a contract which it was not in the power of the legislature of the state of Tennessee to impair. A demurrer was overruled by the trial court but the supreme court reversed the lower court. The judgment in the supreme court was simply one of reversal and without any assignment of reasons whatever. This court held it had jurisdiction under the act of 1889 (pg 56) "whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him, was denied to him by the state court," that it is not necessary that the particular provision of the constitution be set out but "If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provisions did arise, and that the court below could not have reached the conclusion, and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches"; (pg 59) that it was not even necessary to plead that the state court had impaired the obligation of a contract because this appeared by necessary intendment from the facts pleaded and concluded, "It is clear from the record that the supreme court of Tennessee, in dismissing the petition for mandamus, necessarily adjudged that there was not at the time such a contract as the plaintiff, Furman, claimed authorized him to make the tender to the clerk of the notes of the Bank of Tennessee. The jurisdiction of this court is, therefore, complete, and the case must be decided on its merits."

All the foregoing cases were decided under the act of 1789.

In Murdock vs. Memphis 20 Wall, 590, Mr. Justice Miller calls attention to the fact that in deciding the question of jurisdiction this court is not so closely confined to what appears on the face of the record under the act of 1867, as it was under the act of 1789, and says that when a federal question was presented to the state court it must appear *either* (pg 636 "That it must have been decided by the state court, *or* that its decision was necessary to the judgment or decree rendered in the case", thus holding in effect that, if the federal question was necessarily involved, it is sufficient.

In Murray vs. Charleston 96 U. S. 432, the question was whether a statute and a city ordinance under same, impaired a contract by taxing the city's own stock. No federal question was asserted in the pleadings and none referred to in the decision of the trial court. The notice of appeal to the supreme court set forth, (pg 434) "that such tax is a violation of good faith in the contract of loan, impairs the obligation of said contract, and is, therefore, unconstitutional and void."

It was claimed that the record did not show jurisdiction but this court said (pg 441) "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state court expressly assert a right under the federal constitution. *The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right.* Everywhere in our decisions it has been held that we may review the judgments of a state court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist

under the constitution, laws or treaties of the United States, and deciding against that right. *Very little importance has been attached to the inquiry whether the federal question was formally raised.*"

In Chicago Life Ins. Co. vs. Needles, 113 U. S. 574, no federal question was raised in the pleadings and the state court did not in terms pass upon any such question. The plaintiff moved on the final hearing in the state court for a decree in its favor on the ground, among others, that the state statute impaired the obligations of a contract and was in violation of the federal constitution, and on appeal assigned as error the refusal to so decree (pg 578-9). This court said the final judgment of the state court necessarily involved an adjudication of this claim although the state court did not in terms pass upon it and that therefore this court had jurisdiction.

Eureka Lake Co. vs. Yuba County, 116 U. S. 410, holds that when this court may *reasonably infer*, that the federal question raised here, was necessarily involved in the decision of the state court, this court will retain jurisdiction, though it may not appear affirmatively on the record that such question was raised there.

In Arrowsmith vs. Harmoning 118 U. S. 194, the question was as to possession of land. In the supreme court of the state it was assigned as error that the district court in affirming the judgment of the court of common pleas deprived plaintiff of his property without due process of law contrary to the federal constitution. This court said that though such question was not noticed in the opinion of the state court, the question whether or not a state statute was in violation of the federal constitution was necessarily involved, and retained jurisdiction.

In Crescent Live Stock Co. vs. Butchers Union 120 U. S. 141, the sole question was (pg 146) "Did the supreme court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the circuit court of the United States?" Such decree was offered as showing probable cause in an action for malicious prosecution. This court said that the state court failed to give such decree due effect and reversed that court. It does not appear that in the state court any direct reference was made to any federal question and it was argued there was none in the case. This court said the question whether a state court had given due effect to the judgment of a court of the United States is a federal question and in denying such effect to such judgment in itself gave this court jurisdiction. From the necessities of the case there could be nothing in the pleadings concerning such question, but when the state court, as in the case at bar, refused to give *any* effect to the judgment of the state court it necessarily denied a right under the federal constitution and laws.

In Chapman vs. Goodnow 123 U. S. 540, the defendant pleaded in bar a former adjudication in this court in 17 Wall. 153. This court said in sustaining this defense (pg 548) "We are aware that a right or immunity set up or claimed under the constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it,

is as much against the right, within the meaning §709 of the revised statutes, as if it had been specifically referred to and the right directly refused."

In Des Moines Nav. Co. vs. Iowa Homestead Co. 123 U. S. 552, a case growing out of the same facts as Chapman vs. Goodnow supra, it was assigned as error that the court below refused to hold that the plaintiff was estopped by this same former adjudication of this court in 17 Wall. 153. The supreme court of Iowa refused to pass upon this question because not presented in the printed brief, saying the question was not before it. This court looked into the opinion of the Iowa court and the briefs in Littlefield vs. Goodnow submitted with this case in the Iowa court and held that this question *was* before that court and was decisive of the cause and reversed that court for refusing to so decide saying that in so refusing it failed to give due faith and credit to the decree of this court.

In Spencer vs. Merchant 125 U. S. 345, the question was as to the validity of an assessment on lands under the statutes of New York. The plaintiff's sole claim in the state court was in these words (pg 349) "That the statute of 1881 C 689 is unconstitutional and therefore void", because it was an attempt to validate a void assessment without the owners being heard. This court said, that though the constitution of New York was the same as that of the United States as to the provision in question and neither was mentioned, this sufficiently claimed he was deprived of his property without due process of law in violation of the constitution of the United States, and that the adverse decision of the state court "necessarily involved a decision against a right claimed" under that constitution, which this court had jurisdiction to review. (pg 352.)

In Carpenter vs. Strange 141 U. S. 87, this court took jurisdiction and reversed the supreme court of Tennessee solely because the record showed that court did not give the same credit and effect in the state of Tennessee to a judgment of a New York court, which such judgment had in New York.

In Kaukauna Co. vs. Green Bay, etc., Canal Co. 142 U. S. 254, the only question was whether a state statute deprived the plaintiffs in error of their property without due process of law.

The syllabus recites: "If the adjudication of a federal question is necessarily involved in the disposition of a case by a state court, it is not necessary that it should appear affirmatively in the record, or in the opinion of that court, that such question was raised and decided." In denying a motion to dismiss for want of jurisdiction, this court said that notwithstanding the fact of the violation of the constitution is not distinctly put in issue by the pleadings nor directly passed upon in the opinion of the court, yet if it is evident that the court could not have reached the conclusion it did without passing upon the right claimed, it is sufficient for (pg 269) "This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such questions were necessarily involved in the disposition of the case by the state court."

In Roby vs. Colehour, 146 U. S. 153, the question was as to the rights of Roby under a decree in bankruptcy. In denying a motion to dismiss for want of jurisdiction this court said (pg 159) "But although it does not appear from the opinion of the court of original jurisdiction, or the opinion of the supreme court of Illinois, that either court formally passed upon any question of a federal nature, the necessary effect of the decree was to determine, adversely to Roby, the rights and immunities claimed by him, in the pleadings and proof, under the proceedings in bankruptcy to which reference has been made."

In Huntington vs. Attrill 146 U. S. 657, the facts are, with reference to the question of jurisdiction, practically identical with those in the case at bar. A judgment was recovered in New York against Attrill as a director and stockholder in a New York corporation. Action was brought in the circuit court of Baltimore City to enforce that judgment. A demurrer was entered and overruled, but on appeal the court of appeals of Maryland reversed the order and dismissed the bill, because the judgment had, as that court held, been recovered in another state in an action for a penalty.

The state court concluded its opinion in these words (70 Md. 199) "Upon the whole, it appears to us that the complainant has no cause of action, which he can maintain in this state," while in the case at bar the Wisconsin court says (54) "The conclusion reached, is, that the complaint fails to state a cause of action that can be entertained by the courts of this state." This court reversed the court of appeals of Maryland saying (pg 666) "The question whether due faith and credit were thereby denied to the judgment rendered in another state is a federal question, of which this court has jurisdiction on this writ of error."

The court here cites among others, Green vs. an Buskirk, 5 Wall. 307, Crapo vs. Kelley, 16 Wall. 610, Dupasseur vs. Rochereau, 21 Wall. 130.

In Dowell vs. Applegate 152 U. S. 327 the decision is very similar to Huntington vs. Attrill.

Now if I understand these cases they hold that where a party in a state court sets up, as the foundation of his claim, or as a defence, judicial proceedings in another state, and the court of last resort of the state denies the effect claimed to such proceedings, then this court has jurisdiction on writ of error to such court. To plead such proceedings is to sufficiently "set up or claim" such right under the constitution without any reference whatever in the record to the constitution or laws of the United States and when the state court refuses to give the effect claimed or, as in the case at bar, *any* effect to such proceedings, it necessarily passes upon and denies the federal question whether or not it is mentioned. As this court said in Crapo vs. Kelly (pg 620) referring to Green vs. Van Buskirk supra, "Without reference to whether he was right or wrong, the fact that Green claimed under the judicial record of Illinois, and that his claim was overruled, was held to give this court jurisdiction. Without reference to whether Crapo was right or wrong, whether the question was *res integra*, or *res adjudicata*, the fact that he claimed title under the Massachusetts record and that his claim was overruled, gives the court jurisdiction of the

present case. The authority of Green vs. Van Buskirk in 5th Wallace, is clear to that point."

And when Green vs. Van Buskirk was decided on the merits in 7 Wall. 139, the court said again (p. 145), "This court, in denial of the motion to dismiss, held that the supreme court of New York necessarily decided *what* effect the attachment proceedings in Illinois had by the law and usage in that state; and as it decided against *the* effect which Green claimed for them, this court had jurisdiction." In the case at bar the statutes and the proceedings in the Minnesota court were set out. The Wisconsin court refused to give them any effect whatever. That plaintiffs in error set out also in the complaint the facts on which proceedings were had cannot affect the question of jurisdiction any more than in Huntington vs. Attrill where that was also done. The fact that such proceedings were set out and they were denied effect gives this court jurisdiction whatever this court thinks as to the merits of the case.

Great Western Telegraph Co. vs. Purdy 162 U. S. 329, was an action brought by a receiver of the corporation, appointed by the Illinois court to collect an assessment upon the stockholders ordered by said court against Purdy, a stockholder and citizen of Iowa. This court sustained the state court in deciding against the receiver on the statute of limitations but said on the question of jurisdiction (pg 334) "The plaintiff relied on the order of assessment, made by a court of the state of Illinois, as a judgment of that court, entitled to the effect of being conclusive evidence of the plaintiff's right to maintain this action against the defendant. The supreme court of the state of Iowa denied it that effect. The question whether that court thereby declined to give full faith and credit to a judicial proceeding of a court of another state, as required by the constitution and laws of the United States, was *necessarily* involved in the decision. This court therefore has jurisdiction of the case."

The writer of this brief examined the record in that case and nothing concerning the constitution or laws of the United States was alleged in the pleadings. The federal question was necessarily passed upon in arriving at the court's decision.

In Chicago, etc., R. R. Co. vs. Chicago, 166 U. S. 226, the question was whether defendant Railroad Co. was deprived of its property without due process of law in statutory proceedings to condemn land. There was no answer whatever by defendant but on its motion for a new trial, and in its assignments of error to the supreme court the defendant claimed the rulings of the court, the statute and proceedings were contrary to the fourteenth amendment.

In denying a motion to dismiss for want of jurisdiction this court said that the trial court in denying the motion for a new trial and in entering judgment necessarily denied the claim of federal right, and (pg 231) "It is true that the supreme court of Illinois did not in its opinion expressly refer to the constitution of the United States. But that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the state court. The judgment of affirmance necessarily denied the federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right."

In California Bank vs. Kennedy, 167 U. S. 362, the question was as to the power of a national bank to hold stock in another corporation. The only allegation in the pleadings was that the stock issued to the bank was "issued without authority of this corporation defendant and without authority of law." On motion for a new trial below and on the appeal to the supreme court of California it was assigned as error that the bank had no power to hold stock under the laws of the United States. This court said that the suggestion of the want of jurisdiction was without merit.

In Green Bay, etc., Canal Co. vs. Patten Paper Co., 172 U. S. 58, the question in the Wisconsin court was as to the ownership of a water power. The Canal Co. set up in its cross complaint that its rights arose under certain acts of congress, and a certain contract with the United States. This was held sufficient on a motion to dismiss. This court said, after referring to Oxley Stave Co. vs. Butler County, 166 U. S. 648, as holding that the purpose of a party to assert a federal right must not be left to mere inference (p. 67). "But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court *in such a manner as to bring it to the attention of that court*" and then reasserts as the "true and rational rule" in Bridge Proprietors vs. Hoboken Co., 1 Wall 116, *supra*, that it must appear that the party bringing the writ of error relied on some provision of the constitution and that the right thus claimed was denied, and quotes the language of Roby vs. Colehour, 146 U. S. 153 supra, that "If it appears from the record, by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment, without deciding it, that will be sufficient."

The decision of the Wisconsin court, this court, said "necessarily held adversely to these claims of federal rights" and denied the motion to dismiss.

In Meyer vs. Richmond, 172 U. S. 82, the city of Richmond authorized by ordinance a railroad company to obstruct a street. Meyer brought the action against the city to recover consequent damages to his property. A demurrer was entered and judgment entered for defendant, and this judgment sustained by the state supreme court of appeals. He averred in his declaration that the city had no right "under the constitution and laws of the land" to authorize such obstruction. He moved the court to set aside the judgment on the ground that the ordinance and the statute authorizing it were void because depriving him of his property without due process of law contrary to the federal constitution, and in his assignment of errors in supreme court of appeals again took the same position. This court said, on its jurisdiction being challenged, that the allegation in his declaration was not sufficient, but on the authority of Chicago, etc., R. R. Co. vs. Chicago, 166 U. S. 226 supra, that the motion to set aside the judgment sufficiently claimed the right to bring it to the attention of the lower court, and the assignment of errors to that of the higher court, and that the effect of the judgment was to declare the right not infringed, that therefore this court had jurisdiction.

In McCullough vs. Virginia, 172 U. S. 102, where the question was whether a statute impaired a contract, this court said when its jurisdiction was again challenged(p. 116-117) "It has been repeatedly held by this court that in reviewing the judgment of the courts of a state, we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision." * * * "Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction."

In Natl. Bank vs. Anderson 172 U. S. 573, the court held that the federal right under a United States statute was sufficiently claimed to sustain its jurisdiction. (Pg. 574) "By exceptions to the admission of certain testimony, taken on trial, and by the assignment of errors in the supreme court."

In Dewey vs. Des Moines, 173 U. S. 193, the action was to set aside a special assessment for paving a city street. The Polk county Iowa court dismissed the petition and the supreme court affirmed the judgment. It was assigned as error in the supreme court that the rendering of a personal judgment against him was contrary to the constitution of the United States in that it was not due process of law. This court held that this sufficiently raised a federal question to give this court jurisdiction, and said further that if another federal question as the validity of the assessment (pg. 197-198) "were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment," the assignment would have been sufficient to raise that also.

In Pittsburg, etc., Ry. vs. Loan & Trust Co., 172 U. S. 493, the question was as to whether certain foreclosure proceedings in the circuit court of the United States divested the lien created by certain bonds. The defendant Railway Company in its answer alleged that if a lien at any time attached to the property in question to secure the bonds, such lien was discharged by such foreclosure proceedings. This court said (pg. 507), "This, it would seem, was such an assertion of a right and title under an 'authority exercised under the United States' as gives this court jurisdiction to re-examine the final judgment of the state court. Rev. Stat. 709."

In Illinois Central Railroad vs. Chicago, 176 U. S. 646, plaintiff's bill was to secure an injunction to restrain the city from interfering with its right to fill certain lands of the shallow waters of Lake Michigan for railroad purposes. The trial court denied the injunction and dismissed the bill and the supreme court affirmed the decree. The bill alleged that the plaintiff's charter gave it the right to use these lands and that any law of the state of Illinois or any decree of any court thereof which denies or impairs that right, impairs the obligation of the contract created by its charter. No other mention of any federal question was made in the record yet the court said (pg. 657) "We are of the opinion that the federal question in this case was properly set up in the record" and denied the motion to dismiss.

In Sully vs. American Natl. Bank, 178 U. S. 289, there was a gen
eral creditors bill against the Carnegie Land Co. A decree was en
tered adjudging that one Carhart, a non-resident, was entitled to re
cover on certain bonds but subject to claims of the residents of Ten
nessee. The case was taken from the trial court to the court of chan
cery appeals and from there to the state supreme court of Tennessee
where it was modified and affirmed. In this last court Carhart claime
for the first time that the state statute on which the decree was base
violated the provision of the federal constitution, declaring that th
citizens of each state shall be entitled to all the privileges and immu
nities of the citizens in the several states. It was objected that th
question was raised too late, but this court said (pg. 298) "In regard t
the objection that even Carhart has raised the question too late, w
think it is without foundation. He raised it in the supreme court, an
that court decided it against him, not on the ground that he had no
raised it in the lower court, but on its merits."

In Jacobs vs. Marks, 182, U. S. 583, the action was for deceit, i
the circuit court of Cook county, Illinois. Defendant pleaded in ba
the settlement of a former suit in a Michigan court. On the trial de
fendant asked for an instruction that the former suit, if found involv
ing the same controversy, was a bar to recovery. On the motion for
new trial defendant claimed that the verdict was contrary to the federa
constitution because it failed to give due faith and credit to the forme
judgment. On appeal both to the appellant and supreme court it wa
in each case assigned as error that the circuit court failed to give du
faith and credit to the former proceedings as required by the constitu
tion of the United States. This court said the question was sufficientl
raised and denied a motion to dismiss.

In Rothschild vs. Knight, 184 U. S. 334, an action for goods sol
and delivered, was brought in the Superior court of Hampden county
Massachusetts. No federal question was raised in that court, but o
appeal to the supreme court it was assigned as error in various form
that the proceedings below were in violation of the rights secured b
the federal constitution. The supreme court sent a rescript to the su
perior court affirming the judgment and the writ of error here was di
rected to the superior court.

In denying a motion to dismiss this court said (pg. 339) "A mo
tion is made to dismiss the writ of error upon the ground that no federa
question was raised in the superior court. Federal questions were
raised, however, on writ of error to the supreme court, and that we
think was a sufficient claim," citing Meyer vs. Richmond, Arrowsmith
vs. Harmoning and Sully vs. American Natl. Bank, supra.

In National F. & P. Works vs. Oconto W. S. Co., 183 U. S. 216
in an action brought in the state court to enforce a decree obtained in
a mechanics lien suit, a decree of the federal court was pleaded by de
fendant in bar. No federal question was raised in the state court in
any other way. This court said (pg. 233) "As it is thus demonstrated
that the determination whether the court below correctly applied the
plea of *res judicata* necessitates our deciding whether due effect was
given to the decree in the mechanic's lien suit, a federal question is pre
sented which it is our duty to determine."

In Missouri, K. & T. R. Co. vs. Elliott, 184 U. S. 530, the question was as to recovering attorney's fees on an action in the state court on an injunction bond given in a suit in the United States circuit court. Such fees were allowed and the Kansas City court of appeals affirmed the judgment. On motion for rehearing in that court it was contended that in an action in a state court on a bond given in a United States court, the state court was bound to apply to such bond the rule prevailing in the courts of equity of the United States, viz: that attorney's fees are not a proper element of damages. That court distinctly passed upon and denied this claim and at the same time stated in the opinion that the decision involved no federal question. It was claimed that this court had no jurisdiction because the federal claim was made too late, and that the state court had, as itself stated, passed upon no federal question. But this court said it was not too late because actually passed upon by the state court, and (pg. 535) "The fact that the state court, whilst deciding the federal question erroneously held that it was not a federal one, does not take the case out of the rule that, where a federal question has been decided below, jurisdiction exists to review," and said again, citing Chicago B. & Q. R. Co. vs. Chicago, 166 U. S. 226, supra, (pg. 534) "All that is essential is that the federal questions must be presented to the state court in such a manner as to bring them to the attention of that tribunal."

In Erie Railroad vs. Purdy, 22 Sup. Ct. Rep. 605, this court again held that it is sufficient, though the federal question is not presented in the trial court, if it is presented in the highest court of the state and said (pg. 607) "If the highest court of the state, by its final judgment, sustains the validity of a state enactment, drawn in question there as repugnant to the constitution, treaties, or laws, of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court *for the first time* under the constitution, or any treaty, statute, or authority exercised under the United States, this court could review that judgment, *although no federal question was distinctly raised or insisted upon in the trial court.*"

In Bank vs. Farnum, 176 U. S. 640, supra, the facts are identical with the case at bar on this question of jurisdiction, and the record also with this exception, in the report of that case in the state court (20 R. I. 467) it appears that the complaint alleged, just as here that by the decisions of the home court the liability is "contractual, several and transitory," but the pleader seems to have added (pg. 467) "that having been so decided, under the provisions of the constitution of the United States an action on such liability may be had in this state." This seems to me to be a conclusion of law merely, and to add nothing to the pleading. For if it is true that by the decisions of the home court the cause of action is contractual and transitory, as it is certainly pleaded here (43-45), that is itself an assertion of the federal right, for it follows as an inevitable conclusion of law that under the federal constitution "an action on such liability may be had in Wisconsin." I think Bank vs. Farnum decides that the federal question is sufficiently claimed in the complaint at bar.

Plaintiffs in error respectfully submit that the supreme court of the state of Wiscinsin erred in this decision, and denied them a federal

right, and that such federal right was duly claimed. The judgment of that court should be reversed.

Dated, September 8th, 1902.

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